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Trade Barriers in Service/Investment Markets Erected by Korea and Japan

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I. Introduction

The World Trade Organization (WTO)'s ultimate purpose in the international trade regime is to level the frontiers among the trade partner countries by removing trade barriers in order to

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secure fair and free opportunities of competition for the member countries.[1] Unfair and anti-competitive practices in domestic markets[2] can provide a further means of protection in addition to

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[1] Pmbl., Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Legal Instruments–Results of the Uruguay Round vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

[2] Unfair and anti-competitive practices in the domestic markets, in general, would be read as "unreasonable" acts, policies, or practices under the Trade Act of 1974 Section 301(d). The Act defines "unreasonable" to include the following:

> (3) (A) An Act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.
>
> (B) Acts, policies, and practices that are unreasonable include, but are not limited to any, act, policy, or practice, or any combination of acts, policies, or practices, which—
>
> (i) denies fair and equitable—
>
> (I) opportunities for the establishment of an enterprise,
>
> (II) provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade Related Aspects of Intellectual Property Rights referred to in section 3511(d) of this title,
>
> (III) nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection, or
>
> (IV) market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market,
>
> (ii) constitutes export targeting, or
>
> (iii) constitutes a persistent pattern of conduct that-
>
> (I) denies workers the right of association,
>
> (II) denies workers the right to organize and bargain collectively,
>
> (III) permits any form of forced or compulsory labor,
>
> (IV) fails to provide a minimum age for the employment of children, or
>
> (V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers.

19 U.S.C. § 2411(d)(1) (2000). For more information regarding Section 301, see Frank J. Schweitzer, *Flash of The Titans: A Picture of Section 301 in The Dispute between Kodak and Fuji and a View toward Dismantling Anticompetitive Practices in the Japanese Distribution System*, 11 AM. U. J. INT'L L. & POL'Y 847, 852 n.36 (1996)

removing frontier barriers.[3] These anti-competitive practices have been regarded as more important in the service[4] and investment[5] markets than in commodity[6] markets due to their competition distorting effects.[7]

As the multilateral negotiations under the General Agreement on Tariffs and Trade (GATT)/WTO system have reduced the major frontier barriers to international trade, there has been an increasing worldwide interest in anti-competitive practices as trade barriers in domestic markets, particularly in the service and investment markets.[8] With relation to these practices, Korea and Japan have traditionally been targets of criticism from countries

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(citing The Trade Act of 1974, § 301(d), 19 U.S.C. § 2411(d)).

3 *See* Catherine Smith, *The Free Trade Area of the Americas: Is There Still a Place for the World Trade Organization?*, 13 TULSA J. COMP. & INT'L L. 321, 332-33 (2006) (discussing trade policy and competitive policy).

4 Services, herewith, covers all internationally-traded services including telecommunications, tourism, professional services, transportation, advertising, engineering, construction and computer services. *See* ROBERT J. CARBAUGH, INTERNATIONAL ECONOMICS 141-43 (1985); WTO, Understanding the WTO: The Agreements, Services: Rules for Growth and Investment, http://www.wto.org/English/thewto_e/whatis_e/tif_e/agrm6_e.htm (last visited Mar. 2, 2007).

5 Investment, herewith, means "expenditure to acquire property or assets to produce revenue" such as a capital outlay. BLACK'S LAW DICTIONARY 844 (Deluxe 8th ed. 2004). Investment can be divided into Direct Investment that is invested directly in production in another country, either by buying a company there or establishing new operations of an existing business, and Indirect Investment such as buying small parcels of a country's supply of financial products. *See* Frank Franciosa, *International Capital Mobility: Examining the Case for Liberalized Investment as a Mechanism for Improving Developing Country*, 17 WINDSOR REV. LEGAL & SOC. ISSUES 83, 88 n.12 (2004).

6 Commodity, herewith, "embraces only tangible goods, such as products or merchandise, as distinguished from services." BLACK'S LAW DICTIONARY 291 (8th ed. 2004). Commodity can also be defined as "[a]n economic good, especially a raw material or an agricultural product."*Id* *See* United States Department of Agriculture Economic Research Service, *WTO: Commodity Market Issues in the WTO*, *available at* http://www.ers.usda.gov/Briefing/wto/commodities.htm (last visited Mar. 2, 2007) (for coverage under the WTO Agreement).

7 *See* Kevin C. Kennedy, *Foreign Direct Investment and Competition Policy at the World Trade Organization*, 33 GEO. WASH. INT'L L. REV. 585, 585-86 (2001).

8 *See* Jason E. Kearns, *International Competition Policy and the GATS: A Proposal to Address Market Access Limitations in the Distribution Services Sector*, 22 U. PA. J. INT'L ECON. 285, 297 (2001) ("[T]hrough the GATS framework, [m]embers . . . have agreed to maintain appropriate measures to prevent suppliers . . . from engaging in anti-competitive practices.").

that are affected by their trade practices.[9] This is in part due to Korean and Japanese manipulation of anti-competitive practices to protect their domestic markets, particularly their service/investment markets. It is also due to the fact that restrictive competitive practices have not been properly regulated according to their respective trade volume and market size.[10]

This paper compares the anti-competitive practices used by Korea and Japan through the interpretation of anti-competitive practices under the WTO. This interpretation is generally and implicitly affected by international competition norms which have been discussed multilaterally. This comparative study explores the differences in regulating the anti-competitive practices of Korea and Japan, and suggests the coordination and establishment of common rules to regulate the practices of the two countries in the service and investment markets.

This paper also analyzes the effect of anti-competitive practices on international trade and the criticism of Korea and Japan because of these practices. For purposes of this study, the term anti-competitive practices includes private restrictive business practices and governmental regulations of such practices, which hamper the flow of trade and fair competition and have been regarded as trade barriers.[11]

II. International Regulations

A. Anti-competitive Practices as Trade Barriers

Among the multiple international approaches to regulating unfair and anti-competitive practices as trade barriers, one approach is to reconcile the conflicts between trade and competition policy.[12] Here, the term "trade barrier" will mean any

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[9] For example, Japanese and Korean policies and practices related to market access have usually been discussed in the annual National Trade Estimate Report on Foreign Trade Barriers. For more detailed information on this report, see Frederick M. Abbott, *Changing the Dynamic of Dispute Settlement and Avoidance in Trade Relations Between Japan and the United States*, 16 ARIZ. J. INT'L & COMP. L. 185, 190 (1999).

[10] *See id.*

[11] *See generally* Schweitzer, *supra* note 2, at 849-75 (discussing the hampering effect of anti-competitive practices on the flow of trade and fair competition through a focus on Japanese unfair trade practices).

[12] *See, e.g.*, Terence P. Stewart, *U.S.-Japan Economic Disputes: The Role of*

kind of entry barrier to the domestic market which impedes the complete national treatment.[13]

As illustrated through multinational discussions on trade and competition policies,[14] trade barriers of importing countries are a matter of competition policy.[15] Trade barriers can also be assumed to be a matter of trade policy from the viewpoint of the exporting country.[16] In principle, the basic purpose of both trade and competition policies is the improvement of economic efficiency and consumer welfare.[17] Enforcement of the two policies, can create conflicts can when policies with conflicting priorities are imposed.[18] International concerns, particularly under the WTO framework, have recently been concentrated on the competition policy effects on trade policy.[19]

The main purpose of international discussions on the effect of competition policy on international trade—specifically on the use of anti-competitive practices as trade barriers[20]—has been to reduce the disparity among markets of individual countries and to secure fair and free access to domestic markets[21] under the

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Antidumping and Countervailing Duty Laws, 16 ARIZ. J. INT'L & COMP. L. 689, 736 (1999) (discussing the relationship between trade laws and competition laws under GATT/WTO).

13 *See* Christine N. Schnarr, *Left out in the Cold?: The Customs' Country of Origin Marking Requirements, the Section 516 Procedure, and the Lessons of Norcal/Crosetti*, 73 WASH. U. L.Q. 1679, 1685 (1995) "[T]he marking statute creates a two-part trade barrier: [f]irst, the statutory marking requirement acts as an 'entry barrier[,]' [s]econd, the mark itself serves as a 'sales barrier' in the market place." *Id.*

14 *See* Smith, *supra* note 3, at 332-34.

15 *See id.* at 332-33.

16 *See* Kyle Bagwell et al., *The Boundaries of the WTO: It's a Question of Market Access*, 96 AM. J. INT'L L. 56, 67 (2002).

17 Kennedy, *supra* note 7, at 587.

18 For the potential conflicts between the trade laws and the competition laws in the United States, see William H. Barringer, *Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S.-Japan Film Dispute*, 6 GEO. MASON L. REV. 459, 462-63 (1998).

19 *See* Michael K. Young, *Lessons from the Battle Front: U.S.-Japan Trade Wars and Their Impact on the Multilateral Trading System*, 33 GEO. WASH. INT'L L. REV. 753, 756 (2001).

20 For the difficulty in evaluating the anti-competitive business practices as impediments to market access, see Barringer, *supra* note 18, at 477.

21 *See* Mitsuo Matsushita, *United States-Japan Trade Issues and a Possible*

precondition that trade barriers between frontiers should be eliminated completely.[22] Thus, anti-competitive practices have been regarded as trade barriers, which, if not regulated appropriately, could interrupt access to the domestic markets of imported goods and services for foreign exporters.[23]

Since the Havana Charter of the International Trade Organization (Havana Charter) in 1948 failed to establish an international rule regulating restrictive business practices, multilateral and plurilateral efforts have been unsuccessful in regulating anti-competitive business practices.[24] While those attempts[25] have failed,[26] the issue of anti-competitive practices has been raised in recent years in other GATT/WTO contexts,[27] and

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Bilateral Antitrust Agreement Between the United States and Japan, 16 ARIZ. J. INT'L & COMP. L. 249, 250 (1999).

22 For a discussion of a potential agreement on competition policy, see Kennedy, *supra* note 7, at 586.

23 For the most visible and well-documented instance of these restrictive business practices affecting trade, see Barringer, *supra* note 18, at 460. For the difficulty in addressing the anti-competitive practices through the WTO mechanism, see James D. Southwick, *Addressing Market Access Barriers in Japan Through the WTO: A Survey of Typical Japan Market Access Issues and the Possibility to Address Them Through WTO Dispute Resolution Procedures*, 31 L. & POL'Y INT'L BUS. 923, 925 (2000).

24 For important gaps in the WTO rule system, that is, the absence of minimum rules on the maintenance of competitive domestic markets, see Abbott, *supra* note 9, at 185. For the complexity of the international agreements on competition policy, see Kearns, *supra* note 8, at 288-90. Some multilateral and plurilateral efforts have included the International Trade Organization's (ITO) plan to regulate restrictive business practices in 1948, Organization for Economic Cooperation and Development (OECD) guidelines for multinational enterprises in 1976, various attempts by the United Nations to regulate restrictive practices in 1979 and 1980, and a draft of the international antitrust code in 1993. *See* JOHN H. JACKSON, ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (3d ed. 1995) 1090, 1090-1102.

25 *See* Matsushita, *supra* note 21, at 251 (explaining that, in addition to the above international attempts, there have been bilateral attempts to regulate anti-competitive practices, which, currently may be the only possible form of agreement).

26 *See* Southwick, *supra* note 23, at 963-64 (stating that attempts to treat anti-competitive practices and market structures, for example, in Japan, through GATT/WTO mechanisms have been completely unsuccessful).

27 *See* WTO, Singapore Ministerial Declaration of 13 December 1996, WT/MIN(96)/DEC (1996), *available at* http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (last visited Mar. 2, 2007); WTO, The Doha Declaration Explained, http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (last visited Mar. 2, 2007). For at least three WTO agreements speaking directly to the issue of

there has been a general consensus that the interface between trade and competition policies has become more important.[28]

Besides the international efforts to address this matter,[29] many developed countries have regulated various kinds of anti-competitive practices through expanding and applying the concept of fair trade provided in international or individual domestic trade laws, along with the extraterritorial application of their domestic competition laws[30] or positive comity.[31] For example, according to Section 301(d) of the Trade Act of 1974,[32] government toleration of private and systematic anti-competitive activities that effectively restrict access to foreign markets may be regarded as "unreasonable" acts.[33] The concept of reasonable or fair trade practice, which exceeds the scope of the tariff or non-tariff barriers at the frontiers, has become a widely accepted basis of securing

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restrictive business practices, see Kearns, *supra* note 8, at 294.

28 For discussions about the WTO Agreement on Competition designed to deal with anti-competitive practices, see Jean-Francois Bellis, *Anti-competitive Practices and the WTO: The Elusive Search for New World Trade Rules*, *in* NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON 361, 365-366 (2000) (citing Brian Hindley, *Competition Law and the WTO: Alternative Structures for Agreement*, *in* FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE (1996)). For some factors triggering this consensus, see Kennedy, *supra* note 7, at 587.

29 For the lack of clarity of the current WTO System in treating trade disputes involving anti-competitive practices, see Abbott, *supra* note 9, at 185; *see also* Kearns, *supra* note 8, at 297.

30 For cases relating to extraterritorial enforcement of the U.S. Antitrust Laws, see JACKSON ET AL., *supra* note 24, at 1078-89; Merit E. Janow, *Public, Private and Hybrid Public/Private Restraints of Trade: What Role for the WTO?*, 31 L. & POL'Y INT'L BUS. 977, 978-79 (2000).

31 *See* Janow, *supra* note 30, at 979 (discussing the use of positive comity to substitute the extraterritorial application of the domestic anti-trust laws).

32 For the aggressive results-oriented approach under Section 301 of the Trade Act of 1974, see Barringer, *supra* note 18, at 460; Jeffrey Simser, *GATS and Financial Services: Redefining Borders*, 3 BUFF. J. INT'L L. 33, 46 (1996) (citing Wolfgang W. Leirer, *Retaliatory Action in United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1972 and Council Regulation 2641/84*, 20 N.C. J. INT'L L. & COM. REG. 41, 41 (1994)). Regarding the negative effect of the WTO mechanism leading the United States to rely on unilateral measures under Section 301, see Alan W. Wolff, *America's Ability to Achieve Its Commercial Objectives and the Operation of the WTO*, 31 LAW & POL'Y INT'L BUS. 1013, 1027 (2000).

33 RALPH H. FOLSOM & MICHAEL W. GORDON, INTERNATIONAL BUSINESS TRANSACTIONS 536 (1996).

fair competition in foreign markets.[34]

B. Regulation of Trade in Services

As countries venture increasingly into one another's service markets, international efforts to deal with international trade in services have also increased,[35] culminating[36] in the adoption of the General Agreement on Trade in Services (GATS).[37] Considering that many service industries are carefully regulated to protect the public interest,[38] GATS regulates trade barriers that distort competition or restrict access to markets.[39] Simultaneously, GATS requires that legitimate policy objectives be pursued in order to ensure the orderly functioning of markets.[40]

Consequently, restrictions on service suppliers in specified fields and discrimination against foreign suppliers are considered

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[34] For the possible options for solving cases involving such anti-competitive practices in the United States, see Peter D. Ehrenhaft, *Corporate Counsel Committee Briefing on International Antitrust and U.S.-Japan Relations*, ASIL NEWSLETTER (The Am. Soc'y of Int'l Law, Washington, DC), Sept. 1995, *available at* LEXIS.

[35] *See* J. Steven Jarreau, *Interpreting the General Agreement on Trade in Services and the WTO Instruments Relevant to the International Trade of Financial Services: The Lawyer's Perspective*, 25 N.C. J. INT'L L. & COM. REG. 1, 70-71 (1999) (discussing GATS as the result of the first step to internationally regulate the trade in services).

[36] *See* Aly K. Abu-Akeel, *Definition of Trade in Services under the GATS: Legal Implications*, 32 GEO. WASH. J. INT'L L. & ECON. 189, 189 (1999).

[37] *See* General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round vol. 28, 33 I.L.M. 1167 (1994) [hereinafter GATS]. For a full text of agreements resulting from the Uruguay round, see Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

[38] *See* Chung-Han Kim, *Cross-Border Transactions of Financial Services: A Narrow Definition and Possibility of Trade*, 22 ECON. REV. 79, 99-101 (2004) (article in Korean, title translated from Korean).

[39] For the purpose of market access under GATS, see Ruth Ku, *A GATT-Analogue Approach to Analyzing the Consistency of the FCC's Foreign Participation Order with U.S. GATS MFN Commitments*, 32 GEO. WASH. J. INT'L L. & ECON. 111, 117 (1999) (citing JOHN KRAUS, THE GATT NEGOTIATIONS: A BUSINESS GUIDE TO THE RESULTS OF THE URUGUAY ROUND 43 (1994)).

[40] For the most intractable barriers in services, see Joel P. Trachtman, *Trade in Financial Services under GATS, NAFTA and the EC: A Regulatory Jurisdiction Analysis*, 34 COLUM. J. TRANSNAT'L L. 37, 45 n.27 (1995).

barriers to service trade.[41] Regulations mandating compliance with technical standards and qualification requirements to ensure the quality of service and the protection of public interest are considered necessary by the countries in question.[42] Multilateral negotiations have progressively liberalized GATS regulations by removing trade barriers in service markets, while avoiding restricting individual governments' authority to maintain and develop the necessary regulations to pursue their national policy objectives.[43]

Historically, international trade has been viewed as involving only the movement of goods and services across national borders.[44] Trade in services under GATS should be much more comprehensive, covering transactions that involve moving the factors of production as well as the services themselves across borders.[45]

With such an expanded definition of service trade,[46] GATS would be relevant to a wider range of domestic policies, regulations, and measures[47] than GATT,[48] since it would affect[49] the supply of services which traditionally have not been touched

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41 *See* GATS, *supra* note 37, art. XVII.

42 *See id.* art. VI (4).

43 *See id.* pmbl.

44 For the four levels of the differences between trade in goods and trade in services, see Abu-Akeel, *supra* note 36, at 190.

45 *See id.* at 190-92 (discussing issues concerning the scope of applicability of GATS due to the improper definition of the service activities in GATS).

46 For a background of the all-encompassing definition for modes of service supply, see Simser, *supra* note 32, at 49 (citing Pierre Sauve, *Assessing the General Agreement in Trade in Services: Half-Full or Half-Empty?*, 29 J. WORLD TRADE 125, 128 (1995)).

47 The term "measures" covers any action taken by any level of government as well as by non-governmental bodies to which regulatory powers have been delegated, taking any form: law, regulation, administrative decision, guideline, or even unwritten practice. GATS, *supra* note 37, art. XXVIII.

48 *See* Ku, *supra* note 39, at 116-17.

49 For the use of the term "affecting," rather than other terms such as "governing," see Jarreau, *supra* note 35, at 51-52 (citing Panel Report, *European Communities-Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/R/Mex (May 22, 1997) [hereinafter *EC-Bananas*]).

upon by multilateral trade rules.[50] Enforcing domestic policy in the treatment of foreigners in their service activities,[51] for example, could be directly relevant to a country's obligations under GATS. Thus, the obligations covered by GATS concern not only the treatment of the service but also that of the service business or service supplier,[52] which, consequently, regulates the treatment of foreign investors.[53]

While all GATS provisions are important with regard to ensuring cooperation in opening service markets, the scope of application differs,[54] thus setting GATS apart from other agreements.[55] All provisions in GATS are grouped into two clauses: the most favored nation clause-[56] a horizontal clause to be fulfilled in all sectors-[57] and "the [n]ational [t]reatment clause[,][58]

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50 *See* Simser, *supra* note 32, at 36-37 ("Prior to the Uruguay Round, the Organization for Economic Cooperation and Development (OECD) established international frameworks (referred to as Codes) for liberalizing trade in services, [however,] the OECD Codes did not provide a comprehensive . . . multilateral agreement to liberalize trade in services."); *see also* GATS, *supra* note 37, art. VI (6) (where domestic regulation of professional activities is the most pertinent example).

51 *See id.* art. VI (Domestic Regulation) (containing the obligations of WTO member countries for enforcing domestic policy in their service activities).

52 *See* Kearns, *supra* note 8, at 297.

53 *See* GATS, *supra* note 37, Part I. Thus GATS is the first multilateral treaty to regulate the treatment of foreign investors. *See id.*

54 *See* GATS, *supra* note 37, Part III.

55 Mara M. Burr, *Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market?*, 20 HAMLINE L. REV. 667, 673 (1997).

56 GATS, *supra* note 37, art. II. GATT 1994 explains Most Favored Nation (MFN) treatment as follows:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT 1994, *infra* note 114, art. I(1).

57 For a discussion of the most-favored nation principle under GATS contemplating

[which] is vertical, meaning that it is a conditional rule, the application of which depends on specific commitments[59] made by each country."[60] Further, "[i]f a member does make market access commitments, and unless a reservation is otherwise recorded in a member's schedule of commitments, then full market access and national treatment is required."[61]

In sectors of scheduled specific commitments, all measures of general application affecting trade in services[62] are to be

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"a level, competitive playing field," see Jarreau, *supra* note 35, at 63 (interpreting the *EC-Bananas*, *supra* note 49). For a discussion of the negative characteristics of GATS with relation to the MFN principle in GATS, see Simser, *supra* note 32, at 49-51 ("in GATS[,] . . . [m]embers are permitted to schedule exemptions from MFN application. The exemptions for MFN . . . have been described as [a] structural weakness . . . . The compromises necessary to create the agreement were driven by political considerations, not purely by technical trade issues. If the goal of GATS was to create an all-encompassing principle-based agreement, then GATS might be adjudged a failure.").

58 GATS, *supra* note 37, art. XVII. GATT 1994 explains National Treatment as follows:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use . . . .

GATT 1994, *infra* note 114, art. IV(4).

59 Regarding the developing process of the Schedules of Specific Commitments, see Laurel S. Terry, *GATS' Applicability to Transactional Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L. L. 989, 1004 (2001).

60 *See* Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does It Exist In GATT and GATS Frameworks? How Does it Affect or Is It Affected by the Agreement on TRIPS?*, 15 CARDOZO ARTS & ENT. L. J. 281, 299 (1997).

61 *See* Kevin C. Kennedy, *A WTO Agreement on Investment: A Solution in Search of a Problem?* 24 U. PA. J. INT'L ECON. L. 77, 111-12 (2003). A member's schedule of commitments states that "[a]ll schedules must specify: 1) terms, limitations, and conditions on market access; 2) conditions and qualifications on national treatment; 3) undertakings relating to additional commitments; 4) time frame for implementation of commitments; and 5) date of entry into force of commitments." *Id.*

62 *Id.* at 113 ("Typical kinds of numerical limitations . . . inscribed . . . in the schedule of commitments are: 1) limitations in the form of quotas or the requirement of an economic needs test on the number of service suppliers or operations; 2) limitations in the form of quotas on the total value of service transactions or assets; 3) measures that restrict or require specific type of a legal entity or joint venture through which a service supplier may supply a service; 4) limitations on the total number of natural persons that may be employed in a particular service sector; and 5) limitations on the participation of

"administered in a reasonable, objective[,] and impartial manner."[63] This obligation focuses on the manner in which measures are administered and not on their substance,[64] under which foreign service suppliers shall not be discriminated against or impeded in their work by the arbitrary or biased administration of the regulations.[65] Thus, the measures should be based on "objective and transparent criteria" such as competence and the ability to supply the service.[66] Moreover, they should not be "more burdensome than necessary to ensure the quality of the service."[67]

C. Regulation of Treatment of Foreign Investment

Since the 1948 Havana Charter containing provisions on the treatment of foreign investment failed to be ratified, only its provisions on commercial policy were incorporated into GATT 1947.[68] Thus, the link between trade and investment has attracted little attention in the framework of the GATT,[69] which did not

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foreign capital in terms of a maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.").

63 GATS, *supra* note 37, art. VI(1).

64 For a discussion of the GATS principles deriving such obligation, see Jarreau, *supra* note 35, at 66.

65 *Id.* ("Article VI [Domestic Regulation] is intended to prevent Members from denying, nullifying, or impairing GATS benefits to other WTO Members through the use of onerous domestic administrative measures.")

66 For the transparency obligation under GATS, see GATS, *supra* note 37, art. VI(4)(a).

67 GATS, *supra* note 37, art. VI(4)(b). For an analysis of the proportionality provision in GATS, see also Trachtman, *supra* note 40, at 88-89.

68 For more on negotiating a multilateral investment treaty, see Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. PITT. L. REV. 541, 544 (1994) (citing Jeswald W. Salacuse, *Towards a New Treaty Framework For Direct Foreign Investment*, 50 J. AIR L. & COM. 969, 1005-09 (1985) (arguing for a general agreement on direct investment)).

69 For a review of the foreign direct investment among GATT members during the period 1960 to 1981, see Robert H. Edwards Jr. & Simon N. Lester, *Towards a More Comprehensive World Trade Organization Agreement on Trade Related Investment Measures*, 33 STAN. J. INT'L L. 169, 188 (1997) (citing TERENCE P. STEWART, THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 2056-57 (1995)).

seem compatible to the globalization of modern economy.[70]

Perhaps the most significant development with respect to investment during the period before the Uruguay Round was a ruling under the GATT dispute panel between the United States and Canada. Due to Canada's Administration of the Foreign Investment Review Act (FIRA),[71] "an example of a statutory scheme that provided for the negotiation of particularized requirements on a case-by-case basis[,]"[72] a GATT dispute settlement panel decided that the local content requirements[73] were inconsistent with the national treatment obligation of the GATT, but that the export performance requirements,[74] some of the "most trade-distorting" trade-related investment measures (TRIMs),[75] were consistent with GATT obligations.[76]

The panel decision in the FIRA case ensured that existing obligations under GATT were applicable to performance requirements imposed in the investment context, if the requirements involve trade-distorting measures.[77] Simultaneously,

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70 For the need to negotiate a multilateral investment treaty under the modern economy, see Shenkin, *supra* note 68, at 579.

71 For more detailed information on Canada's FIRA, see Shenkin, *supra* note 68, at 561-62.

72 Edwards Jr. & Lester, *supra* note 69, at 186.

73 Local content requirement is a kind of government non-tariff barrier which imposes the use of a certain amount of local input in production. *See* Y. S. Lee, *Bilateralism under the World Trade Organization*, 26 N.W. J. INT'L L. & BUS. 357, 366 (2006); *see also*, Stewart, *supra* note 12, at 699.

74 *See* Victor Mosoti, *The WTO Agreement on Trade Related Investment Measures and the Flow of Foreign Direct Investment in Africa: Meeting the Development Challenge*, 15 PACE INT'L L. REV. 181, 188 n.29 (2003) (explaining the analysis of local content requirements and export performance requirements in Canada-Administration of Foreign Investment Review Act, Report of Panel, BISD 30S/140 (1984)). Export performance requirements are undertakings requiring foreign investors to export certain amounts or percentages of output imposed by the host country's authorities as the condition for approval of investment projects. *Id.*

75 *See* Edwards Jr. & Lester, *supra* note 69, at 191.

76 *See* Paul Civello, *The TRIMs Agreement: A Failed Attempt at Investment Liberalization*, 8 MINN. J. GLOBAL TRADE 97, 99 (1999) ("local content requirements mandating the use of domestically produced products, local equity requirements affecting ownership, foreign exchange restrictions, and export or trade-balancing requirements.") (citing Catherine Curtiss & Kathryn Cameron Atkinson, *The United States-Latin American Trade Laws*, 21 N.C. J. INT'L L. & COM. REG. 111, 127 (1995)).

77 *See* Shenkin, *supra* note 68, at 563-64.

the panel's conclusion that export performance requirements were not covered by GATT also underscored the limited scope of existing GATT disciplines with respect to such trade-related performance requirements.[78]

During the Uruguay Round negotiations that concerned trade-related investment measures,[79] there was strong disagreement among participants over the coverage and nature of possible new disciplines.[80] The resulting WTO Agreement on Trade-Related Investment Measures (TRIMs),[81] is essentially limited to the application of the trade-related investment measures of GATT provisions to national treatment[82] and quantitative restrictions of imports or exports,[83] and does not cover other measures, such as export performance and the transfer of technology requirements.[84]

Since it is based on existing GATT disciplines on trade in goods, the TRIMs Agreement is not concerned with the regulation of service or foreign investment itself.[85] Consequently, the imposition of regulations concerning discrimination between domestic and foreign investors in TRIMs could not be treated multilaterally under the TRIMs Agreement but rather only bilaterally or plurilaterally under the regional agreements.[86]

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78 *See* Edwards, Jr. & Lester, *supra* note 69, at 191.

79 *See id.* at 210-11 (categorizing TRIMs into "traffic light categories"). This categorization is similar to the Swiss government's proposal, made during the Uruguay Round negotiations, which divided TRIMs into the same three categories: prohibited, permitted, and actionable. *See id.* at 211.

80 For a discussion of the two issues central to the TRIMs negotiations, see Edwards Jr. & Lester, *supra* note 69, at 194.

81 Agreement on Trade Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1125, 1868 U.N.T.S. 186 (1994) [hereinafter TRIMs Agreement].

82 *See id.* art. II (citing GATT, *infra* note 114, art. III).

83 *See id.* (citing GATT, *infra* note 114, art. XI). For more details about TRIMs Agreement's failure to cover more provisions, see Civello, *supra* note 76, at 97.

84 For the Multilateral Agreement on Investment proposed by the OECD as an alternative to inefficient TRIMs, see Civello, *supra* note 76, at 123.

85 *See* Shenkin, *supra* note 68, at 565 (explaining that a local content requirement imposed in a nondiscriminatory manner on domestic and foreign enterprises is inconsistent with the TRIMs Agreement because it involves discriminatory treatment of imported products in favor of domestic products).

86 *See id.* at 566 ("Although [foreign investors] are directly affected by TRIMs

III. Trade Barriers in the Korean Market

A. General

"During the dynamic period of economic growth and development from the 1960s to the 1990s, the Korean government promoted economic development much more directly and positively than any other Asian country[,]"[87] resulting in a greater unevenness in "income growth, prices, trade[,] and [in the pattern of] structural change."[88] During this time period, the government maintained a "positive role" in the management of the Korean economy.[89] The condensed growth initiated by the government has been achieved at the cost of development of a national competition policy,[90] which in turn raises the costs to foreign service suppliers or investors accessing and doing business in the Korean service market.[91]

In service markets, domestic regulation is a more important and serious trade barrier than in commodities markets.[92] Despite the Korean government's efforts,[93] Korean laws and regulations related to trade in services as well as to trade in goods have generally been criticized for lacking specificity[94] and transparency[95] in the rulemaking procedures and in maintaining

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imposed by host countries on their investments, they have no legal recourse [under the TRIMs Agreement;] only goods producers do.").

87 Eun Sup Lee, *Anti Competitive Practices as Trade Barriers used by Korean and Japan*, 17 TRANSNAT'L LAW. 177, 184-85 (2004) (citing SOON CHO, THE DYNAMICS OF KOREAN ECONOMIC DEVELOPMENT 27-59 (1994).

88 *Id.* at 184-85.

89 *See id.*

90 *See id.*

91 *See* Eun Sup Lee, *Regulation of Foreign Trade in Korea*, 26 GA. J. INT'L & COMP. L. 135, 135-36 (1996).

92 *See* GATS, *supra* note 37, art. VI.

93 *See, e.g.*, WTO, Trade Policy Review-Korea: 2000 (2000), http://www.wto.org/english/tratop_e/tpr_e/tp138_e.htm. The "Korean government has made effects to improve transparency in trade and investment policies." *Id.*

94 *See* Eun Sup Lee, *Safeguard Mechanism in Korea Under the WTO World*, 14 TRANSNAT'L LAW. 323, 355 (2001).

95 For the requirements of transparency, see GATS, *supra* note 37, art. III.

regulatory systems.[96] Internal office guidance, for example, developed by relevant government agencies but rarely published,[97] gives direction in the implementation of regulations. Also, adequate information about planned or actual changes to laws and regulations is not available.[98] This system gives governmental officials leeway to exercise wide discretion in applying laws and regulations, resulting in inconsistency in their application and "uncertainty" in doing business in Korea.[99]

Korea maintains restrictions in some service sectors through a negative list,[100] in which foreign investment is prohibited or severely circumscribed through equity or other restrictions, and is in line with the GATS spirit and disciplines to allow the member countries to make scheduled specific commitments.[101]

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96 For detailed criticism raised by the United States, see OFFICE OF THE U. S. TRADE REPRESENTATIVE, 2006 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (KOREA), at 412-13, http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_NTE_Report/asset_upload_file682_9188.pdf (last visited Mar. 2, 2007) [hereinafter 2006 NTE (KOREA)].

97 *See* GATS, *supra* note 37, art. III.

98 *See* Eun Sup Lee, Anti-competitive Practices as Trade Barriers used by Korea and Japan, presented at Ritsumeikan Asia Pacific Conference held by Ritsumeikan Asia Pacific University, Japan, 12, Nov. 28-29, 2003 (on file with the North Carolina Journal of International Law and Commercial Regulation).

99 *See* 2006 NTE (KOREA), *supra* note 96, at 413.

100 A negative list for trade in services allows for trade in any service unless it is specifically 'excluded' in the trade treaty, while a positive list allows for trade only if a service is specifically 'included' in the trade treaty. As such, a negative list is considered to be more liberal in encouraging international trade than a positive list.

Larry Crump, *Global Trade Policy Development in a Two-Track System*, 9 J. INT'L ECON. L. 487, 493 n.21 (2006).

101 GATS, *supra* note 37, Part III. There have been disputes on both positive list and negative list approaches to schedule market access commitments among the Round participants during the Uruguay Round, and the resulting specific commitments made under the GATS have been a mixture of both approaches:

> Only those industries listed in a member's schedule of commitments are open to foreign service suppliers with respect to at least one mode of supply (i.e., a positive list approach). However, if a member has made a commitment, only the conditions, limitations, or qualifications on market access and national treatment listed in the schedule may be imposed (i.e., a negative list approach).

Kennedy, *supra* note 61, at 111 (footnote omitted). As such, under the negative list approach, "a member is prohibited from maintaining or adopting several types of

B. Non-financial Markets

Korea is among the world's top advertising markets, but also one of the most highly restricted.[102] Although the Korean government has progressively implemented some market-oriented measures in recent years,[103] anti-competitive practices[104] have shackled the flexibility of advertisers to respond to their immediate market needs.[105]

Anti-competitive advertising censorship procedures, have been reported.[106] As a result, advertising materials must be submitted in fully produced film format rather than as storyboard, significantly increasing the risks and costs of developing new advertising campaigns and introducing new brands.[107] These practices may be in breach of provisions prohibiting unnecessary restrictions to trade in services[108] as well as provisions affording protection to materials submitted under GATS[109] and Trade Related Aspects of Intellectual Property Rights (TRIPs).[110] In addition, products that have been tested and approved in other countries must be re-tested

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limitations or measures, unless it has otherwise so specified in its schedule." *Id.* at 112 (footnote omitted).

102 2006 NTE (KOREA), *supra* note 96, at 407.

103 These measures include the Global Standard system offering advertising airtime in various time lengths and providing more purchasing flexibility. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2004 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (KOREA), 305, http://www.ustr.gov (follow "Document Library" hyperlink; then follow "USTR Reports and Publications" hyperlink; then follow "2004 USTR Reports and Publications"; then follow "2004 National Trade Estimate Report on Foreign Trade Barriers" hyperlink; then follow "Korea" hyperlink) (last visited Mar. 2, 2007) [hereinafter 2004 NTE (KOREA)].

104 These practices are regulated under GATS. *See* GATS, *supra* note 37, arts. VIII, IX.

105 *Id.*

106 *Id.*

107 *See* 2004 NTE (KOREA), *supra* note 103, at 305.

108 *See* GATS, *supra* note 37, art. VI(4).

109 *Id.* art. III *bis.*

110 Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 81 (1994), art. 39 [hereinafter TRIPs Agreement].

in Korea,[111] a practice which may be inconsistent with GATS as well as other WTO provisions.[112]

The Korean film industry's strict screen quota system is considered discouraging to trade, cinema construction, the expansion of film distribution in Korea, and the overall competitiveness of the Korean film industry.[113] Korea's insistence on keeping its strict screen quotas has been a topic of dispute in bilateral and multilateral trade negotiations, which could be approved under the provisions of the current GATT[114] and GATS,[115] but has nevertheless been controversial in terms of progressive liberalization.[116]

Korea restricts foreign activities in the TV sector by limiting monthly broadcasting time, maintaining annual quotas for foreign broadcast motion pictures and animation, and restricting foreign

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111 *See* 2004 NTE (KOREA), *supra* note 103, at 305.

112 *See, e.g.*, Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments-Results of the Uruguay Round (1994), art. 6.3 [hereinafter TBT Agreement].

113 Korea maintains screen quotas on imported motion pictures, requiring that domestic films be shown in each cinema a minimum number of days per year (currently, 146 days with reductions to 73 days if certain criteria are met). 2006 NTE (KOREA), *supra* note 96, at 407.

114 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, arts. 3, 4, 10 [hereinafter GATT]. The GATT parties adopted GATT again in 1994, with minor changes, as part of the agreement creating the WTO. When it is necessary to distinguish the two, they are called "GATT 1947" and "GATT 1994." WTO Agreement, *supra* note 1, art. II(4). For details on the GATT cinema provisions, see GATT 1994, art. IV:

> If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements: (a) screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion . . . in the commercial exhibition of all films of whatever origin, . . . (c) any contracting party may maintain screen quotas . . . which reserve a minimum proportion of screen time for films of a specified origin . . . (d) screen quotas shall be subject to negotiation for their limitation, liberalization or elimination.

Id.

115 GATS makes an exception for protecting "public morals" or "public order." GATS, *supra* note 37, art. XIV(a).

116 *Id.* art. VI.

investment in broadcasting.[117] These last restrictions could become a controversy between the domestic policy objectives[118] promoted by the Korean government and the national treatment[119] claimed by the partner countries.

Korea regulates its cable TV sector through annual quotas.[120] These quotas limit market access and the development of Korea's film and animation industries.[121] In addition, "[t]he Korean government [] restricts foreign ownership of cable television-related system[s,]" program providers, and foreign participation in satellite broadcasts.[122] These restrictions could basically be in accordance with the frameworks and requirements of GATS,[123] which allow a member to schedule its market access commitments in order to "list the service sectors and modes of supply for which individual members have agreed to provide full or practical access to service suppliers of other WTO members[.]"[124] However, such commitments have become controversial with trade partner countries in terms of progressive liberalization.[125] GATS "contemplates that the process of progressive liberalization may take place through bilateral, plurilateral, or multilateral negotiations in each round, provided they are aimed at raising the overall level of specific commitments."[126]

The Korean professional service market has been an important target of trade disputes, especially since the financial crisis in

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117 2006 NTE (KOREA), *supra* note 96, at 408.

118 GATS, *supra* note 37, pmbl, art. VI.

119 *See id.* art. XVII.

120 *See* 2006 NTE (KOREA), *supra* note 96, at 408.

121 *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (KOREA), at 380, http://www.ustr.gov (follow "Document Library" hyperlink; then follow "USTR Reports and Publications" hyperlink; then follow "2005 USTR Reports and Publications"; then follow "2005 National Trade Estimate Report on Foreign Trade Barriers" hyperlink; then follow "Korea" hyperlink) (last visited Mar. 2, 2007) [hereinafter 2005 NTE (KOREA)].

122 *See* 2006 NTE (KOREA), *supra* note 96, at 408.

123 *See* GATS, *supra* note 37, arts. XIV, XVI.

124 Kennedy, *supra* note 61, at 110.

125 *See* 2005 NTE (KOREA), *supra* note 121, at 380-81.

126 Kennedy, *supra* note 61, at 113-14 (footnote omitted).

1997.[127] For example,[128] despite the Korean government's efforts to liberalize the legal services market,[129] Korea has been criticized for not providing for foreign legal consultants,[130] thus creating serious difficulties for foreign lawyers[131] employed by local firms.[132]

Korea also restricts the establishment of foreign accounting firms[133] and foreign Certified Public Accountants (CPAs) are required to fulfill the same requirements as Korean CPAs.[134] For example, accounting firms in Korea are prohibited from making an investment in or providing a debt guarantee to any other firm in excess of ten percent of the accounting firm's paid-in-capital.[135]

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127 *See* Eun Sup Lee, *Anti-Competitive Practices as Trade Barriers Used by Korea and Japan: Focusing on Service and Investment Markets*, 16 BOND L. REV. 117, 144 (2004).

128 The empirical "study of the effects of the deregulation of legal services . . . in Great Britain provides some insights into the potential benefits of terminating a cartel in a legal services market" in Korea. Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services under the General Agreement on Trade in Services*, 16 MICH. J. INT'L L. 941, 955 (1995) (citing Simon Domberger & Avrom Sherr, *The Impact of Competition on Pricing and Quality of Legal Services*, 9 INT'L REV. L. & ECON. 41, 41 (1989)).

129 These include the amendment not only of the Lawyer Act to permit foreigners to be licensed to practice law in Korea in 1996, but also of the Regulation in Foreign Investment in 1977 to allow for foreign investment in the legal sector. 2004 NTE (KOREA), *supra* note 103, at 307.

130 For some of the reasons for the scope of practice restriction to foreign lawyers, including protecting the public, see Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATT And NAFTA*, 5 MINN. J. GLOBAL TRADE 159, 165 (1996) (citing John Haley, *The New Regulatory Regime for Foreign Lawyers in Japan: An Escape From Freedom*, 5 UCLA PAC. BASIN L.J. 1, 14 (1986)); Richard L. Abel, *The Future of the Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 751 (1994).

131 For other forms of the regulation of foreign lawyers in general, see Flores, *supra* note 130, at 164, 167-68, 170.

132 For some of the rationales upon which Korean authorities rely to restrict access to foreign attorneys, see Chapman & Tauber, *supra* note 128, at 952-53.

133 In Korea, such restrictions include the requirement of a minimum number of Korean-certificated accountants/partners employed. *Id.* at 951.

134 "Foreign . . . CPAs are required to fulfill the same requirements as Korean CPAs, including: i) obtaining Korean certification; ii) completing a two-year internship; and iii) registering with the public accountants association." 2005 NTE (KOREA), *supra* note 121, at 381.

135 *Id.*

These restrictive requirements are justified currently under GATS provisions[136] and are required to be reviewed from the viewpoint of the productivity and efficiency of the Korean accounting industry as well as policy objectives.[137]

In the engineering industry, "although there are no [legal] restrictions on foreign engineering services[,] procuring agencies (national, local[,] and private) can specify particular conditions [on a discretionary basis] . . . depending on the nature of the project[,]"[138] possibly raising national treatment[139] and transparency[140] issues.

The anti-competitive or unfair trade practices discussed above may deviate from the spirit of the WTO provisions concerned and the international norms discussed. Moreover, some elements of these practices are affected by the social or cultural circumstances specific to Korea. The social and cultural aspects of such practices, however, are too complicated and controversial to be justified under current WTO provisions.

C. Financial Markets

Despite the Korean government's efforts to improve the financial market,[141] foreign-based, non-financial organizations in Korea are required to follow burdensome and costly procedural requirements for financial transactions[142] that are incompatible with Korea's level of development and financial sophistication.[143] "Virtually all intra-company transfers are subject to certification[,] . . . which is a cumbersome, and unnecessary requirement, particularly for transactions between subsidiaries[.]"[144] This requirement seems to reflect the positive policy objectives of the Korean government to regulate the

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136 GATS, *supra* note 37, art. XVI.

137 *See id.* art. VI.

138 2005 NTE (KOREA), *supra* note 121, at 381-82.

139 *See* GATS, *supra* note 37, art. XVII.

140 *See id.* art. III.

141 For details, see 2006 NTE (KOREA), *supra* note 96, at 409-10.

142 *See* 2004 NTE (KOREA), *supra* note 103, at 307.

143 *See id.*

144 *Id.*

improper internal transactions, particularly of conglomerates. Even though most foreign exchange and capital account transactions for individuals have been liberalized,[145] foreign exchange transactions and derivatives trading by corporations and financial institutions are still regulated.[146]

Almost all of the restrictions imposed by the Korean government on financial market and foreign exchange transactions seem to reflect Korea's unique domestic situation. These restrictions are difficult to justify in the face of the policy objectives[147] or procedural requirements[148] provisioned by GATS. For example, policy decisions on the complete liberalization of exchange transactions would require the consideration of the political and social situation unique to a peninsula divided into two politically controversial regimes, not to mention the economic and legal considerations which are common to all countries.[149] These policies could be justified under GATS provisions on policy objectives with sufficient rationale and evidence. It would be difficult, however, to establish sufficient rationales and evidence for those restrictions, particularly without clear construction of the WTO provisions to take into account such unique situations of the member countries.[150]

In the insurance industry, which has been the central target of trade disputes with the United States since the 1980s,[151] the regulatory environment for foreign insurance companies has improved considerably "since Korea implemented a series of regulatory changes following its 1996 OECD accession[.]"[152]

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145 *See* Foreign Exchange Transactions Law, Law No. 7716 (2005), *available at* http://www.klaw.go.kr/CNT2/Easy/MCNT2EasyLawService.jsp?s_lawmst=72182 (last visited Mar. 2, 2007) (in Korean).

146 *See* 2006 NTE (KOREA), *supra* note 96, at 410.

147 *See* GATS, *supra* note 37, pmbl.

148 *See id.* art. VI.

149 *See id.* pmbl, art. VI.

150 Eun Sup Lee, *Anti-Competitive Practices as Trade Barriers Used by Korea and Japan: Focusing on Service and Investment Markets*, 16 BOND L. REV. 117, 146 n.169 (2004).

151 *See* Lee, *supra* note 91, at 156-58.

152 OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2003 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (KOREA), at 254, http://www.ustr.gov (follow "Document Library" hyperlink; then follow "USTR Reports and Publications"

However, "a considerable gap remains between Korea's practices and those found in more developed insurance markets."[153]

The ambitious restructuring of the Korean insurance industry has been encouraged since the 1997 financial crisis[154] through the newly established Financial Supervisory Service (FSS),[155] the Korean government's financial watchdog and center for financial reform.[156] The FSS has encouraged restructuring by way of insolvency or implementing workout programs[157] supervised by the FSC. While insurance companies and banks are regulated by experienced officials of the FSS, however, the government-run Korea Post is overseen "by the Ministry of Information and Communication which does not have the same regulatory expertise."[158] Moreover, "[u]nlike private sector insurance companies, which must follow more stringent regulations prior to introducing new products or in training new staff, Korea Post enjoys a streamlined, less regulatory ability to introduce new products and is not subject to the same training and examination insurance sales staff."[159]

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hyperlink; then follow "2003 USTR Reports and Publications"; then follow "2003 National Trade Estimate Report on Foreign Trade Barriers" hyperlink; then follow "Korea" hyperlink) (last visited Mar. 2, 2007) [hereinafter 2003 NTE (KOREA)]. For more details, see Organization for Economic Co-operation and Development, Korea and the OECD, http://www.oecd.org/about/0,2337,en_33873108_33873555_1_1_1_1_1,00.html (last visited Mar. 2, 2007).

153 2006 NTE (KOREA), *supra* note 96, at 409.

154 For details on the Korean financial crisis in 1997, see David Richardson, Asian Financial Crisis, Economics, Commerce and Industrial Relations Group (Austrl.), June 29, 1998, Current Issues Brief No. 23 1997-98, *available at* http://www.aph.gov.au/library/pubs/cib/1997-98/98cib23.htm.

155 Since the financial crisis, the Korean government has been gradually liberalizing foreign entry into the life and non-life insurance markets, has lifted some restrictions on partnering with Korean insurance companies and hiring Korean insurance professionals, and has liberalized insurance appraisals and activities ancillary to the management of insurance and pension funds. *See* 2004 NTE (KOREA), *supra* note 103, at 307-08.

156 *See* Eun Sup Lee, *Regulation of Insurance Contracts in Korea*, 13 TRANSNAT'L LAW 1, 5 (2000).

157 *See* 2004 NTE (KOREA), *supra* note 103, at 307 ("A workout program is a voluntary, out of court debt- restructuring framework, which may or may not involve government oversight.")

158 2006 NTE (KOREA), *supra* note 96, at 409.

159 *Id.*

In the banking industry, despite the Korean government's positive efforts at restructuring since the financial crisis,[160] "the International Monetary Fund [IMF] and the U.S. government have strongly urged Korea to privatize state-owned banks, which would allow market forces to more efficiently allocate financial resources and increase investor confidence in the Korean economy."[161]

Korea has been criticized for restricting the operations of foreign bank branches based on branch capital requirements.[162] For example, "[f]oreign banks are subject to the same lending ratios as Korean banks, which require them to allocate a certain share of their loan portfolios to Korean companies other than the top four *chaebol* conglomerates"[163] as well as to "small and medium enterprises."[164] In addition, "[a]lthough foreign investors may legally become majority owners of Korean banks, this has proven to be difficult in practice."[165] Thus, all banks in Korea suffer from a non-transparent regulatory system and are required to seek approval before introducing new products and services—an area where foreign banks are most competitive—which may be in breach of GATS provisions on transparency[166] and national treatment.[167]

In the securities industry, despite the Korean government's liberalization,[168] foreign securities firms in Korea have allegedly encountered some non-prudential barriers to their operations.[169]

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160 For more details, see 2004 NTE (KOREA), *supra* note 103, at 308.

161 *Id.*

162 "These restrictions limit: loans to individual customers; foreign exchange trade; and foreign-bank capital adequacy and liquidity requirements." *Id.*

163 *Id. Chaebol* conglomerates share three common characteristics: "i) a governance structure of family dominance; ii) an organizational structure of a holding company controlling formally independent firms; and iii) a business structure of extensive diversification." STEPHEN HAGGARD ET AL., ECONOMIC CRISIS AND CORPORATE RESTRUCTURING IN KOREA: REFORMING THE CHAEBOL 3 (2003).

164 2006 NTE (KOREA), *supra* note 96, at 410.

165 2003 NTE (KOREA), *supra* note 152, at 255.

166 *See* GATS, *supra* note 37, art. III.

167 *See id.* art. XVII.

168 For the Korean government's liberalization measures, see 2006 NTE (KOREA), *supra* note 96, at 410.

169 For the provision about prudential measures as the prudential curve-out, see Jarreau, *supra* note 35, at 67 (citing WENDY DOBSON & PIERRE JACQUET, FINANCIAL

Substantial parts of the Korean government's measures in the financial sector have been evaluated as anti-competitive or non-transparent by trade partner countries such as the United States.[170] These accusations of anti-competitive practices reveal different priorities. For example, the Korean government's basic policy has been to give a higher priority to stabilizing the markets and protecting public interest than promoting market mechanisms or efficient allocation of resources. This is in contrast to other advanced western countries, where market functions are strongly pursued by the governments.[171] The Korean government's positive restrictions on foreign exchange transactions could also reflect the same situation.[172]

The recognition of such differences in policy objectives among the member countries may represent one of the rationales for strengthening the importance of domestic regulations in the service sector in GATS, which differs substantially from GATT in the commodity sector.[173]

D. Investment Markets

The Korean government has been strongly committed to creating a more favorable investment climate and to facilitating foreign investment since the financial crisis in 1997,[174] but additional steps, including resolution of certain labor market issues, reduction of labor-management disputes and improvement of regulatory transparency are required to fully achieve this goal.[175] The 1998 Foreign Investment Promotion Act "expanded business sectors open to foreign investment[,] expanded tax incentives[,] simplified investment procedures[,] and established Free Economic Zones."[176]

SERVICES LIBERALIZATION IN THE WTO 76 (1998)). For the proper measures created for prudential reasons, see Simser, *supra* note 32, at 57.

170 *See, e.g.*, 2006 NTE (KOREA), *supra* note 96, at 409-10.

171 *See* Lee, *supra* note 156, at 34-35.

172 *See* Lee, *supra* note 91, at 141-42.

173 *See* GATS, *supra* note 37, art. VI.

174 *See* 2004 NTE (KOREA), *supra* note 103, at 309.

175 *See* 2006 NTE (KOREA), *supra* note 96, at 411.

176 2004 NTE (KOREA), *supra* note 103, at 309. The Free Economic Zones have an extensive range of incentives including tax breaks, tariff-free importation, relaxed labor

The Korean government is required to automatically approve foreign investors' notification of their investment into Korea unless the activity appears on an explicit "negative list"[177] or is related to national security, the maintenance of public order or the protection of public health, morality, or safety, which are generally excused under the WTO mechanism.[178] "Since May 1998, foreigners have been permitted to engage in hostile takeovers and may purchase 100 percent of a target company's outstanding stock without consent of its board of directors."[179] Traditionally, this was a point of contention with trade partner countries, although the Korean government proclaimed an open policy for inward foreign investment.[180]

The 2006 National Trade Estimate for Korea[181] reported that:

> [c]apital market reforms have eliminated or raised the ceiling in aggregate foreign equity ownership, on individual foreign ownership[,] and on foreign investment in the government, corporate, and special bond markets. These reforms also have liberalized foreign purchases of short-term financial instruments issued by corporate and financial institutions. However, the Korean government still maintains foreign equity restrictions with respect to investments in various state-owned firms and many types of media, including . . . cable and satellite television services and channel operators, as well as schools and beef wholesalers.[182]

These restrictions may be evaluated case by case under the criteria

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rules, and improved living conditions for expatriates in areas such as housing, education, and medical services. 2006 NTE (KOREA), *supra* note 96, at 411. The Korean government still maintains foreign equity restrictions with respect to investments in various state-owned firms and many types of media as well as schools and beef wholesale. *See id.*

177 This requirement, for example, may be relevant to the spirit of the GATS provisions (Part III, Specific Commitment) applied to scheduled specific sections in which positive regulations are imposed by negative methods. 2004 NTE (KOREA), *supra* note 103, at 309.

178 *See* GATT 1994, *supra* note 114, art. XX; GATS, *supra* note 37, art. XIV.

179 2004 NTE (KOREA), *supra* note 103, at 309.

180 *See id.*

181 2006 NTE (KOREA), *supra* note 96, at 411.

182 *Id.*

of policy objectives[183] or domestic regulations[184] provided in the WTO Agreements without pure investment-specified provisions.

The Korean government removed restrictions on the direct purchase of land by foreigners[185] through the 2004 revision of the Alien Land Registration Acquisition Act.[186] Non-Koreans, however, still cannot produce certain agricultural products for commercial purposes, or take agriculturally-zoned land out of agricultural production.[187] These restrictions are regarded as investment barriers[188] and they may conflict with the policy objectives under GATS, considering the traditional Korean policy in the agricultural sector.[189] While the more liberalized Korean investment regime has increased foreign investors' interest in Korea, additional changes[190] are required by the trade partner countries to improve Korea's attractiveness for foreign investment.[191]

Objectively assessing the Korean government's policy for the liberalization and deregulation of the inward foreign investment

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183 *See* GATS, *supra* note 37, pmbl.

184 *See id.* art. VI.

185 *See* Choi Kyong-ae, *Foreigners own 17% of Big Buildings in Seoul*, THE KOREA TIMES, Oct. 12, 2004, *available at* http://search.hankooki.com/times/times_index.htm (search for "foreigners" and "Seoul," date restrict from "October 12, 2004" to "October 12, 2004") (last visited Mar. 2, 2007). As of August, 2004, foreigners are reported to own 17% of big buildings with more than 11 stories in Seoul. *Id.* "In Asia, the most attractive property market is reported to be Japan where US dollars 784 billion worth of properties are earmarked for foreigners. Korea has 4901 billion US dollars worth of properties available for foreign investment." *Id.*

186 Foreigner's Land Acquisition Act, Law No. 7297 (2004), *available at* http://www.klaw.go.kr/CNT2/Easy/MCNT2EasyLawService.jsp?s_lawmst=66247 (last visited Mar. 2, 2007) (in Korean).

187 2006 NTE (KOREA), *supra* note 96, at 411. These kinds of regulations are, of course, beyond the application of WTO provisions when they are not related to the goods trade.

188 *Id.*

189 *See* GATS, *supra* note 37, art. VI.

190 Such changes include "resolving certain market issues (e.g. better pension mobility, more flexibility in hiring and firing workers, expanded unemployment compensation, less rigid worker visa rules, and better job training and placement services), reducing labor-management disputes, and improving regulatory transparency." 2006 NTE (KOREA), *supra* note 96, at 411.

191 *Id.*

market is difficult without internationally accepted regulatory mechanisms. For now, the investment environment in Korea seems anemic to foreign investors and is not as attractive as the government's ambitious policy to improve it.[192]

IV. Trade Barriers in Japanese Market

A. General

For the majority of the post-war era, the principal goal of Japan's economic policy has been development and stability.[193] Free competition has sometimes appeared to be inimical to that goal.[194] As such, competition policies which have been treated as organizing principles for the economy,[195] rather than as regulation policies, have resulted in a regulation-based economy.[196] Consequently, "Japan's economy today suffers from over regulation and its concomitant inefficiency, while at the same time Japanese social and labor conditions are relatively stable."[197] Although Japan has recently responded to internal and external requirements,[198] by focusing on deregulation,[199] over-regulation in

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192 For the gap between the government's policy and the practical environments of the foreign direct investment in Korea, see Kil Sum Kim, *M&A as Violent Gale*, KOREAN INST. FOR LAB. STUD. AND POLICIES, *available at* http://kilsp.jinbo.net/publish/98/981202.htm (last visited Mar. 2, 2007) (in Korean).

193 Economic stability has been regarded as presupposing a relatively high level of government intervention in business planning. *See* Abbott, *supra* note 9, at 187.

194 *See id.*

195 For the relative priorities of competition policy in Japan, see Lee, *supra* note 150, at 151 n. 195 (citing Michael Wise, *Review of Competition Law and Policy in Japan*, OECD J. COMPETITION L. & POL'Y 4 (2000)).

196 For criticism against the Japanese competition policy, see Southwick, *supra* note 23, at 949.

197 Abbott, *supra* note 9, at 187-88.

198 *See id.* at 337-38 (discussing the U.S.-Japan Regulatory Reform and Competition Policy Initiative operated by the United States and Japan for bilateral efforts to promote comprehensive deregulation and structural reform in Japan).

199 For the structural reform of the Japanese government, see OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2006 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (JAPAN), at 346-52, http://www.ustr.gov (follow "Document Library" hyperlink; then follow "USTR Reports and Publications" hyperlink; then follow "2006 USTR Reports and Publications"; then follow "2006 National Trade Estimate Report on Foreign Trade Barriers" hyperlink; then follow "Korea" hyperlink) (last visited Mar. 2,

Japan has hampered economic growth, raising the cost of doing business and impeding imports and foreign investment, particularly in the service markets.[200] Some Japanese regulations aim squarely at the entry of foreign services in order to protect the *status quo* against market entrance.[201] These regulations, however, have stifled entrepreneurship and inhibited risk-taking and innovation.[202]

As a world leader, the Japanese service and investment market has traditionally been the core target of trade disputes with other trade partner countries including the United States,[203] even under the WTO mechanism.[204] The highly regulated, inefficient system[205] in the Japanese distribution markets, for example, has widely been acknowledged as a significant trade and investment barrier.[206] Distribution issues in Japan have been addressed by trade partner countries through basic approaches focusing on "aspects of competition law, deregulation of measures supporting restrictive distribution structures, and agreements calling upon the Japanese government to use administrative guidance and moral persuasion to loosen the tight relationships between Japanese producers and distributors."[207] "The central issue with regulatory

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2007) [hereinafter 2006 NTE (JAPAN)].

200 *See id.* at 368-72.

201 For the partner countries' concerns about the law enforcement effects of the Japanese Fair Trade Commission relating to market access, see Lee, *supra* note 87, at 193 n.110.

202 For details on the Japanese government regulations and measures, see 2006 NTE (JAPAN), *supra* note 199, at 346-49.

203 *See* Wolff, *supra* note 32, at 1024.

204 *See id.* at 1025-26 (commenting on the fitness of the WTO to treat Japan's special trade barriers).

205 For the difficult situation foreign companies face in getting access to distribution in Japan, see Southwick, *supra* note 23, at 927 (citing OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1999 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 205, 215).

206 "Domination of the distribution system by Japanese producers can create a significant market access problem in many industries in Japan because of the cost, risk, and difficulty of establishing an alternative distribution network." *Id.* at 928 (citing H. IYORI & A. UESUGI, THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN, at app. H (1994)).

207 *Id.* at 929.

barriers raised in the disputes is seemingly a bias against new entrants, new products, and lower prices, which may appear in regulations that are simply too rigid or vague."[208]

B. Non-financial Markets

With regard to professional services, the ability of foreign firms and individuals to provide professional services in Japan has been hampered by a complex network of legal, regulatory, and commercial practice barriers.[209] In the accounting and auditing services market, foreign service providers have allegedly faced a series of regulatory and market access barriers in Japan which have impeded their ability to serve this important market.[210] These barriers include requiring foreign CPAs to register as members of the Japanese Institute of Certified Public Accountants, prohibition of foreign CPA audit activities, prohibition of audit corporations' provision of tax-related services, and other requirements which are burdensome to foreign CPAs.[211]

Foreign lawyers have sought greater access to Japan's legal services market and the full freedom to associate with Japanese lawyers (*bengoshi*) since the 1970s.[212] However, strong opposition from the Japan Federation of Bar Associations (*Nichibenren*) and a reluctant Japanese bureaucracy has largely thwarted this objective.[213] "In Japan, one of the largest legal markets in the world, foreign and local lawyers face strict regulation."[214] Since 1987, Japan has allowed foreign lawyers to establish offices and advise on matters concerning the law of their home jurisdictions in Japan as foreign legal consultants, subject to certain restrictions.[215]

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208 *Id.* at 956.

209 *See id.* at 928, 956.

210 Lee, *supra* note 150, at 153.

211 *See id.* at 153-54.

212 *See* Chapman & Tauber, *supra* note 128, at 961 n.116 (discussing the substantial pressure from the United States and the European Union on Japanese officials to reduce restrictions on foreign lawyers).

213 *See* Karen Dillon, *Unfair Trade?*, AM. LAW., April 1994, at 53 (discussing the cultural concerns to limit foreign lawyers' scope of practice apart from the fear of lack of qualifications).

214 Flores, *supra* note 130, at 169.

215 Gaikoku Bengoshi niyoru Horitsujimu no Toriatsukai ni kansuru Tokubetsusochi

While Japan has liberalized several restrictions on foreign lawyers, the most critical structural deficiency in Japan's international legal services sector is that severe limitations are imposed on the relationships between Japanese lawyers and registered foreign legal consultants.[216] Foreign lawyers are allowed to form limited partnerships,[217] called specified joint enterprises (*tokutei kyodo kigyo*), instead of allowing *bengoshi* and foreign lawyers (*gaiben*) to form partnerships. These joint enterprises are highly regulated and do not provide the framework needed for effective teamwork between *bengoshi* and *gaiben*. Further adjustments to that system will not meet the needs of foreign lawyers in Japan.[218]

Foreign lawyers are required to follow strict accounting guidelines in order to share offices, and the joint enterprise can give only limited advice on Japanese law.[219] Japanese lawyers can form partnerships with individual foreign lawyers, but not with a foreign lawyer's law firm.[220] The "restrictions on foreign lawyers to employ or form partnerships with local lawyers severely handicaps a law firm's ability to serve its clients, and inhibits the growth of international law firms because they force branch offices to farm out work locally."[221] In addition, Japan requires annual residency of 180 days and limits foreign lawyers to only

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Ho, (Act Providing Special Measures for Handling Legal Business by Foreign Lawyers), in 2 DOING BUSINESS IN JAPAN 613 (Z. Kitagawa, ed. 1987)). The law basically "conditions the ability of a foreign lawyer to practice in Japan on reciprocal treatment of Japanese lawyers in the foreign lawyer's home country." Chapman & Tauber, *supra* note 128, at 961 (citing AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW AND PRACTICE REPORT TO THE HOUSE OF DELEGATES: MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS, 28 INT'L LAW. 207, 212-13 (1994)).

216 Amongst the industrialized countries, Japan's regulations on foreign lawyers have been reported to be the most stringent and discriminatory. *See* Chapman & Tauber, *supra* note 128, at 960.

217 *See* Flores, *supra* note 130, at 168-69.

218 *See* Dillon *supra* note 213, at 53.

219 *See id.* at 55.

220 *Id.*

221 Flores, *supra* note 130, at 169 (citing Bob Rossi, *NAFTA Won't Open Doors for Lawyers; Despite Negotiations, Limits on Foreign Law Practices Will Remain*, LEGAL TIMES, Oct. 25, 1993, at 8).

one office in Japan.[222] These regulations, combined with the high cost of maintaining an office in Tokyo, effectively keep most foreign lawyers out of practice in Japan.[223]

Furthermore, education, language, and cultural differences have worked to keep foreign lawyers from establishing a larger presence in Japan.[224] With regard to determining legal professionals' form of association, it is advisable to encourage them to best serve their clients' needs and to establish a legal environment that is "conducive to international business and investment and that supports deregulation and structural reform."[225] Thus, it is recommended that foreign lawyers be allowed to "hire Japanese lawyers[] to provide advice on so-called 'third country' law (that is, the law of a country other than the one that is a foreign lawyer's home jurisdiction) on the same basis as Japanese lawyers, and to establish professional corporations, limited liability partnerships (LLPs)[,] and limited liability corporations."[226] It has been further recommended that "the *Nichibenren* and the mandatory local bar associations provide *gaiben* with effective opportunities to participate in the development and enforcement of all laws and rules that affect them."[227] "After more than 15 years of urging by the foreign legal community, Japan enacted legislation in 2003 that substantially eliminates restrictions on the freedom of association between

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222 *See* Keneth S. Kilimnik, *Lawyers Abroad: New Rules for Practice in a Global Economy*, 12 DICK. J. INT'L L. 269, 323 (1994); OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2004 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (JAPAN) at 255-56, http://www.ustr.gov (follow "Document Library" hyperlink; then follow "USTR Reports and Publications" hyperlink; then follow "2004 USTR Reports and Publications"; then follow "2004 National Trade Estimate Report on Foreign Trade Barriers" hyperlink; then follow "Korea" hyperlink) (last visited Mar. 2, 2007) [hereinafter 2004 NTE (JAPAN)].

223 Kilimnik, *supra* note 222, at 323.

224 *See* Burr, *supra* note 55, at 685.

225 2006 NTE (JAPAN), *supra* note 199, at 351.

226 OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2003 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (JAPAN) at 221, http://www.ustr.gov (follow "Document Library" hyperlink; then follow "USTR Reports and Publications" hyperlink; then follow "2003 USTR Reports and Publications"; then follow "2003 National Trade Estimate Report on Foreign Trade Barriers" hyperlink; then follow "Korea" hyperlink) (last visited Mar. 2, 2007) [hereinafter 2003 NTE (JAPAN)].

227 *Id.*

foreign and Japanese lawyers, effectively permitting partnership and employment relationships between them."[228] This was followed by the new system of Joint Law Firms (Kyodo jigyo) in 2005.[229]

Many of the anti-competitive practices in the Japanese accounting and legal services markets seem to be established and operated to maintain domestic markets, especially when considering the demands from Japanese and foreign multinational enterprises on Japanese markets,[230] which is similar to the situation in Korea. There may, however, be specific instances when such anti-competitive practices are affected by the cultural or social circumstances peculiar to the two countries.

C. Financial Markets

"Japan's private insurance market is the second largest in the world after that of the United States."[231] The Japanese insurance sector is regulated by the Financial Services Agency (FSA), which was established in 1998.[232] The FSA is in charge of all aspects of financial regulation in Japan, including inspection, supervision and surveillance of financial activities related to banking and securities business in addition to insurance, the function of which is similar to Korea's FSS,[233] which was established after the financial crisis in 1997.[234]

As the Japanese government has pursued further deregulation and liberalization in this sector, and despite noteworthy success, a

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228 2006 NTE (JAPAN), *supra* note 199, at 351.

229 *Id.* at 372.

230 The scarcity of qualified lawyers and accountants needed for M&A activities, for example, has reportedly inhibited FDI to Japan. *See* 2004 NTE (JAPAN), *supra* note 222, at 272.

231 2006 NTE (JAPAN), *supra* note 199, at 368. The Japanese insurance market is composed of private insurers, a large public sector provider of postal life insurance products (*kampo*), the National Public Health Insurance System and a web of mutual aid societies (*kyosai*). *See id.*

232 *Kampo*, the world's largest insurer, and *Kyosai* are excluded from regulation by the FSA. *See id.* at 368-71. Because of this, they enjoy substantial competitive advantages in Japan's insurance market. *See id.*

233 *See supra* Lee p. 123 and note 156, at 6 (describing the creation and powers of the FSS).

234 *See* Lee, *supra* note 150, at 156.

number of controversial issues have been raised by trade partner countries. These include further liberalization and expansion of the insurance market, as well as the introduction of new products such as variable annuities and the possible expansion of sales of such products by banks.[235] Trade partner countries have required the Japanese government to adopt the policy of increasing competition as a basic principle of regulatory reform,[236] and to provide the foreign and domestic insurance industry meaningful opportunities to comment and exchange views with Japanese officials[237] regarding the development or revision of guidelines or regulations. Such opportunities are provided through public comment procedures[238] and participation in government advisory groups.[239]

The FSA is required to shorten standard approval periods and transition to a quicker, less burdensome file-and-use system for certain insurance products.[240] Partner countries are also concerned

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235 OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2005 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (JAPAN), at 306-07, http://www.ustr.gov (follow "Document Library" hyperlink; then follow "USTR Reports and Publications" hyperlink; then follow "2005 USTR Reports and Publications"; then follow "2005 National Trade Estimate Report on Foreign Trade Barriers" hyperlink; then follow "Korea" hyperlink) (last visited Mar. 2, 2007) [hereinafter 2005 NTE (JAPAN)].

236 For the motivations for deregulation in Japan from the 1980s to 1990s, from the viewpoints of the trade partner countries, see Hiroko Yamane, *Deregulation and Competition Law Enforcement in Japan: Administratively Guided Competition?*, 23 WORLD COMPETITION 141, 142 (2000).

237 For the bureaucrats' use of the deliberate councils, (*shingikai*) to diminish opportunities for open conflict in policy adjustments, see David Boling, *Access to Government-Held Information in Japan: Citizens' "Right to Know" Bows to the Bureaucracy*, 34 STAN. J. INT'L L. 1, 20-21 (1998); Ken Duck, *Now That The Fog Has Lifted: The Impact Of Japan's Administrative Procedures Law On The Regulation Of Industry And Market Governance*, 19 FORDHAM INT'L L. J. 1686, 1699-1700 (1996).

238 Japan adopted its first government-wide public comment procedures in 1999 to solve the problem that even though public policy and regulations are made by and instituted through constant interaction with the private sector, few opportunities exist for interested parties having no special access to the authorities or related councils to have any input into the legislative process. *See* 2006 NTE (JAPAN), *supra* note 199, at 348. However, the effectiveness of the regulations is uncertain. *See* 2004 NTE (JAPAN), *supra* note 222, at 254.

239 2006 NTE (JAPAN), *supra* note 199, at 348.

240 In Japan, for example, life insurance is regulated through control of rate estimation factors, which restrict effective price competition among insurance companies. *See* Eun Sup Lee, *Efficient Regulation of the Insurance Industry to Cope*

about the policyholder protection corporations,[241] which are mandatory policyholder protection systems created by Japan in 1998 to provide capital and management support to insolvent insurers.[242] Despite their strong and stable presence in the Japanese insurance market, foreign insurers continue to have serious concerns about the transparency and fairness of the funding framework.

These concerns and practices raised by trade partner countries as trade barriers to Japanese financial markets are similar to those of Korea. In part, they are evaluated as trade barriers operated intentionally to protect domestic markets. However, substantial parts of the practice are seemingly rooted in consumer-protection or market-stability oriented policies,[243] which would be difficult to evaluate under the current GATS system.

D. Investment Markets

Although most direct legal restrictions on FDI have been eliminated, bureaucratic obstacles remain. These include the occasional discriminatory use of bureaucratic discretion,[244] particularly through the use of administrative guidance.[245] While Japan's foreign exchange laws currently require only *ex post* notification of planned investment in most cases, a number of sectors (e.g., agriculture, mining, forestry, and fisheries), which have traditionally been the national strategic industries in Japan, still require prior notification to government ministries.[246] More

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with Global Trends of Deregulation and Liberalizations, 13 BOND L. REV. 46, 59 (2001). Korea maintains a similar practice. *See id.* In the United States, life insurance is regulated through indirect rate controls. *See id.*

241 2006 NTE (JAPAN), *supra* note 199, at 371.

242 *See id.*

243 For a description of the regulatory objectives of consumer protection in Japanese financial services compared with the United Kingdom, see Mamiko Yokoi-Arai, *The Regulatory Efficiency of a Single Regulation in Financial Services: Analysis of the UK and Japan*, 22 BFLR-CAN 23, 55-56, 68-69 (2006).

244 For the ability to address these types of barriers in Japan through WTO procedures, see Southwick, *supra* note 23, at 924-25.

245 For the increasing effectiveness of administrative guidance in Japanese industrial policy, see FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 169 (1987).

246 2003 NTE (JAPAN), *supra* note 226, at 221.

than government-related obstacles,[247] however, Japan's low level of inward FDI flows[248] reflect the impact of exclusionary business practices[249] and high market entry costs.[250]

Difficulty in acquiring existing Japanese firms, as well as doubts about whether such firms, once acquired, can continue normal business patterns with other Japanese companies,[251] makes investment access through mergers and acquisitions (M&As) more difficult in Japan than in other countries.[252] The lack of financial transparency and disclosure as well as differing management techniques have been cited as obstacles to M&A activity in Japan.[253]

Although there has traditionally been "antipathy toward FDI, Japanese attitudes toward inward investment have become positive, and some progress has been made through the introduction of consolidated taxation and revised bankruptcy procedures that make it easier for corporations and their assets to be acquired or merged in a 'rescue' format."[254] Furthermore:

> Japan has enacted new and revised legislation providing opportunities for foreign investors. For example, the Industrial Revitalization Law provides existing firms undergoing reorganization (both domestic and joint-venture) with tax and credit relief once the Japanese government approves the firm's business restructuring plan. A new bankruptcy law (the Civil Reconstruction Law)[255] also may provide investment

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247 *See* Lee, *supra* note 87, at 187-92.

248 2006 NTE (JAPAN), *supra* note 199, at 372 ("Despite being the world's second largest economy, Japan continues to have the lowest inward FDI as a proportion of total output of any major OECD nation.").

249 *See* Southwick, *supra* note 23, at 974-75.

250 *See id.* at 956 (discussing the private anti-competitive practices that could undermine the benefits of regulatory reform in Japan).

251 For the key reasons for the persistence of anti-competitive business practices in Japan resulting in these doubts from the viewpoint of Japan's competition policy and regulation, see 2006 NTE (JAPAN), *supra* note 199, at 346-47.

252 *Id.* at 372-73.

253 2006 NTE (JAPAN), *supra* note 199, at 372-73.

254 *Id.* at 373.

255 *See* NISHIMURA & PARTNERS, CIVIL RECONSTRUCTION LAW (MINJISAISEIHO) -THE FIRST DIP TYPE BANKRUPTCY PROCEDURE IN JAPAN (2001), http://www.jurists.co.jp/en/topic/2001/t020.shtml (describing the process and operation

> opportunities as it encourages business reorganization, including spin-offs, rather than the forced liquidation of assets. Other legislative changes now provide for stock options for employees, a key issue for foreign firms wishing to attract high quality employees. In addition, Japan has prepared legislation on corporate divestiture that will facilitate a company's streamlining efforts. New accounting rules are bringing Japan close to the international standard and to a degree have helped reduce extensive cross-shareholding among firms, as the new accounting rules identify non-performing asset and liabilities.[256]

The practices and barriers to Japanese investment as cited above are not in step with Japanese economic development, which might be due to the government's traditional policy of protecting the domestic market. Some legal or administrative barriers could be eliminated or easily reduced under the current regulatory or deregulation reforms if they were enforced.[257] However, some barriers reflecting Japanese exclusionary business practices or social backgrounds cannot be removed so easily.[258] Particularly, the practices reflecting the Japanese exclusionary business atmosphere seem unique, which are substantially different from those of Korea.[259] Additionally, many of those practices are difficult to evaluate with regard to the multilateral norms included in the WTO Agreements without transparent investment regulations.[260]

V. Review

The above analysis demonstrates that trade barriers in the service markets of Korea and Japan have almost identical characteristics, scope, and effectiveness, even though there are differences in the degree of the criticism against those barriers

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of the new law). The law is the first real debtor-in-possession type bankruptcy procedure in Japan. *See id.* The Civil Reconstruction Law (*Minjisaiseiho*) became effective in April 2000. *Id.*

256 2003 NTE (JAPAN), *supra* note 226, at 221-22.

257 *See* Yamane, *supra* note 236, at 142.

258 *See* Lee, *supra* note 87, at 194-95.

259 *See id.* (comparing Japanese exclusionary business practices with Korean anti-import biased atmosphere).

260 *See* Southwick, *supra* note 23, at 925.

from their trading partner countries.[261] This may be indicative of each market's economic value to their partners' foreign markets. For example, anti-competitive practices indicated by the Japanese trade partner countries in the Japanese service markets, including the banking and insurance sector, are very similar to those in the Korean service markets.[262]

These practices reflect the policy objectives of both governments to emphasize consumer protection and the stability of financial institutions rather than fostering competition or operative efficiency, which is somewhat different from developed western countries.[263] Such policy objectives reflect the overall social and cultural environments of the two countries, emphasizing the stability rather than the productivity or the efficiency of any institution.

This result seems distinct from the conclusion that the author made with respect to the two countries' commodity markets.[264] That study revealed substantial differences between the anti-competitive practices of the two countries' markets; that is, some Japanese exclusive business practices in commodity markets were determined to be rooted in the intrinsic Japanese social atmosphere, which might not be controlled easily by government policy and is different from that of Korea.[265] Substantial parts of

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261 *See id.* at 927-28 (describing the basic difference in the practices of a few sectors, including distribution industry, in Korea and Japan).

262 *See* Lee, *supra* note 150, at 160.

263 *See generally* Robert C. Eager & C. F. Muckenfuss, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System*, 8 N.C. BANKING INST. 21 (2004) (discussing the effects of federal regulatory preemption on the federal-state dual banking system); Yokoi-Arai, *supra* note 243, at 23-76 (discussing the reforms and shortfalls of the Japanese regulatory scheme); Anna Jackson Holly, Comment, *The Gramm-Leach-Bliley Act: Protection Of Consumers or Excuse to Avoid Discovery?*, 36 CUMB. L. REV. 615 (2005-2006) (describing the effect of the Gramm-Leach-Bliley Act on financial service competition and consumer protection).

264 *See generally* Lee, *supra* note 87, at 177-208 (analyzing the anti-competitive practices of the two countries dividing into those in domestic markets and those between frontiers).

265 *See id.* at 194-95 ("[the anti-import biased social atmosphere in Korea and the exclusionary business practices in Japan] seem somewhat different from the viewpoint that the former atmosphere could be very temporary and extremely vulnerable to changes in the overall social atmosphere or consumption attitudes in Korea, while the latter practices might take time to change because they are the products of the long-standing

service and investment barriers in Japan, which are particularly related to the private markets without policy consideration, may also originate from those exclusionary business practices intrinsic to Japanese markets.[266]

Considering the overall economic situations of the two countries, including the level of development of the service and commodity markets, this result—though different from the commodity and investment markets—implies that the service markets are deeply affected by cultural factors as well. As viewed by international standards, the two countries' cultural backgrounds are almost the same, which makes their governments' policy objectives for service market regulations very similar.[267]

For example, from the viewpoint of the partner countries, the Japanese excuse for preventing foreign lawyers from participating in any type of litigation is that it is necessary to prevent Japan from becoming a litigious society,[268] which seems to be the same rationale given in Korea.[269] This rationale may seem ridiculous or unreasonable from the market viewpoint or profit-centered approach adopted by western countries. In both countries, however, people have traditionally been very reluctant to stand up in court, which has sometimes been seen as a shortcut to individual bankruptcy, particularly in civil cases. Indeed, Koreans and Japanese very often deliberately assume economic losses instead of bettering their situation through legal action in court. Considering the cultural and social atmosphere of the two countries, the governments are apt to be persuaded to protect their legal cultures from western countries. There are many other situations in both countries' service markets which reflect their particular cultural circumstances.[270]

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commercial practices of the business society in Japan.").

266 *See* Southwick, *supra* note 23, at 955-56 n.91.

267 *See* Flores, *supra* note 130, at 167 (stating the cultural concerns which perhaps prompt countries to limit foreign lawyers' scope of practice).

268 *See, e.g., id.* at 163 (noting the goal of "preserving the integrity of the local legal profession").

269 Lee, *supra* note 150, at 161.

270 *See generally* Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (With Japan and the United States in Mind)*, 27 MICH. J. INT'L L. 1 (2005) (discussing the impact of cultural difference in settled resolutions).

No cultural exceptions or provisions *per se* emerge from the text of GATS. This is in contrast to the case of GATT, where, even though it is far from being sufficient to deal with the cultural aspects of trade, there are a few culture-related provisions.[271]

In the WTO rule-based context, disagreement on cultural factors influencing trade in services makes the regulation of service trade by GATS inefficient and controversial among the member countries with different cultural and social backgrounds.[272] Complementary provisions reflecting the cultural differences among the member countries might effectively be incorporated into GATS. Until such complementary provisions are made, the governments of Japan and Korea should try to establish scientific and concrete evidence to support those practices that reflect their particular cultural-social environments. Such evidence could demonstrate the reasonableness and fairness of those factors to international trade, as well as the necessity of sustaining specific public policy objectives, or the inevitable reflection of the particular situation intrinsic to their countries.

At the same time, it is advisable to establish interpretation rules of the WTO Agreement that fully take into account the cultural and social environments unique to the member countries.[273] These new rules would hopefully consider the individual countries' specific situations regarding the cultural, social, political, and historical backgrounds and atmospheres.

The implementation of such rules might be seen as contradictory to the spirit embodied in recent international trade regulations toward hard laws, as in the case of the WTO regime from GATT.[274] For the practical and efficient formation of

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271 GATT's cultural exclusions include Article XX(f) (protection of national treasures of artistic value), Article XIX (emergency action on imports of particular products) and Article IV (special provisions to cinematograph films). These exclusions, however, are not sufficient to consider the specific cultural/social backgrounds of circumstances of the individual member countries. *See* GATT 1994, *supra* note 114, art. IV, XIX, & XX(f).

272 *See* Cahn & Schimmel, *supra* note 60, at 291-304.

273 For the lack of specificity regarding cultural products within international trade, see Karsie A. Kish, *Protectionism to Promote Culture: South Korea and Japan, A Case Study*, 22 U. PA. J. INT'L ECON. L. 153, 161-62 (2001).

274 "Hard law refers to a system of norms as to which a relatively high expectation of compliance exists." Abbott, *supra* note 9, at 196.

international trade and competition regulations, however, their uniform enforceability should properly be mixed with flexibility.[275] Such flexibility should be complemented with the adoption of strict rules of evidence. Even though it might be very difficult and complicated to sufficiently evaluate the anti-competitive practices in the service markets and anti-competitive TRIMs in terms of cultural and social factors as well as economic and political factors, such an undertaking is desirable in order to continue to promote international trade in services without serious cultural contradiction among the member countries under the WTO system.

Along with the incorporation of the aforementioned provisions into GATS, it is also advisable to improve the current WTO dispute settlement mechanism. One approach to improving the current dispute settlement mechanism is to establish an independent GATS dispute settlement body including a panel and an appellate body.[276] The panel and the appellate body would consist of permanent members who possess specific qualifications to deal with the cultural, social, economic, and political aspects of the disputes. These members would be appointed by the WTO through open competition procedures.[277]

Hence, the GATS dispute settlement framework would operate like a well-established international court. It would consist of a

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275 It has been suggested:

> [f]or example, in the case of the TBT Agreement, taking into account the existence of legitimate divergences of geographical and other factors between countries the Agreement extends to the members the regulatory flexibility to reflect the differences between them. There, the degree of flexibility is limited by the requirement that technical regulations should not become unnecessary obstacles to trade . . . . These provisions extending flexibility to the application of the TBT Agreement could be expanded and applied more generally to the construction of the WTO Agreement concerned.

Lee, *supra* note 87, at 207 n.223.

276 *See* Lee, *supra* note 127, at 163.

277 If constituted this way, the panel of GATS dispute settlement body would also make United States' Section 301 "usable only at very high cost" as indicated by Alan Wm. Wolff. *See* Wolff, *supra* note 32, at 1025-27 (stating "The failure of WTO dispute settlement has made Section 301 . . . usable only at very high cost . . . . The WTO has no ability to investigate. There are no adequate safeguards to screen out bias in staff . . . . The panel itself is likely to consist of busy disputes with other, more pressing, responsibilities.").

two-tier mechanism with reliable authority, which could provide a more predictable legal environment in coordinated international service markets.[278] The establishment of such an independent GATS dispute settlement body would also help to establish a clear construction of rules related to the provisions of the current WTO Agreements, which take into sufficient consideration the unique situations of the individual countries. Such a dispute settlement body would be an improvement upon the current dispute settlement mechanisms under GATS, which were established without sufficient consideration of the cultural aspects of trade in services.

VI. Concluding Remarks

Many of the competition and trade-related laws in Japan and Korea, particularly in the service and investment markets, have been enacted and modified passively due to the expressed or implied pressure from their trade partner countries and the requirements of international organizations like the WTO and OECD. Trade pressure on both countries in the service and investment fields was particularly serious from the 1980s to the 1990s, during which time both countries took various measures to open and liberalize their service markets.[279] Thus, such modifications were not a voluntary response by the governments to internal public and private sector concerns.

The modifications seem to have occurred in this manner because the two countries' rapid economic growth and development during the past forty years was influenced by their governments' strong export-driven policies (which were not balanced with the corresponding competition regulations) and their heavy dependence on foreign trade. However, under the WTO mechanism, both countries' competition and foreign trade regulations should be improved voluntarily in accordance with the liberalized global service and investment market systems. Subsequently, the countries could pursue their trade policy

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278 For the other soft approach through the non-binding panel to treat the disputes raised from competition policy, see Kearns, *supra* note 8, at 313.

279 For detailed discussion on the trade friction between Korea and the United States in the field of service industry as well as the commodity field, see Lee, *supra* note 91, at 155-59.

objectives.

Competition policies or anti-competitive practices such as trade barriers, particularly in the service and investment markets, are substantially affected by the historical, political, cultural, and social environments of the individual countries. This makes it difficult to evaluate competition policy under uniform standards of international norms as well as to produce internationally accepted uniform norms to regulate competition-related matters. The fact that the anti-competitive practices of both countries have been comparatively reviewed via international trade norms that have only been discussed, but not yet established, and without consideration of other external factors, limits the research possibilites.

This paper is expected to be followed by an interdisciplinary analysis of the anti-competitive business practices of the two countries to discover effective and cooperative policy directions for solving the trade and competition-related problems. Such an analysis may also suggest a direction towards more effective regulation of trade in services in the coming WTO negotiation rounds.